Bhagwan Singh v Wong Sin Chong & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO D-02-619 OF 1996
LAMIN PCA, AHMAD FAIRUZ AND DENIS ONG JJCA
26 AUGUST 1999

Civil Procedure *— Appeal — Record of appeal — Filing of — Absence of grounds of judgment — Whether grounds of judgment must necessarily form part of record of appeal — Rules of the Court of Appeal 1994 r 18(4) & (7)*

The appellant had received the notes of proceedings on 15 January 1998 though without the grounds of judgment and was out of time to file the record of appeal by three months and 22 days. The appellant applied for an extension of time to file the record of appeal on the following grounds: (i) he was not be able to draft his memorandum of appeal without the benefit of the grounds of judgment; and (ii) the meaning of the words 'record of appeal' as provided for under r 18(4) read with r 18(7) of the Rules of the Court of Appeal 1994 ('the rules') was to include the grounds of judgment and therefore as he was not yet in possession of the grounds of judgment, he could not file the record of appeal within the meaning of the rules.

Held, dismissing the motion:

(1) At the hearing of the application for leave, the appellant though was not in possession of the grounds of judgment, had managed to convince the court that he should be granted leave to appeal. Obviously, he was fully seized of the merits and demerits of his case that should deserve a rehearing at the appeal (see p 211C–D).

(2) Even though the grounds of judgment were still not available within the three weeks from 15 January 1998 (date of receipt of notes of proceedings), the appellant must proceed to file the notes of proceedings together with all other documents as stipulated in the other paragraphs, namely paras (a), (b), (c), (d) and (f) of r 18(4). Paragraph (e) of r 18(4) clearly provides that the absence of the grounds of judgment shall not prevent the appellant from proceeding with his appeal. The appellant could file the grounds of judgment separately at any time before the hearing of the appeal (see pp 211H–212A).

[Bahasa Malaysia summary

Perayu telah menerima nota-nota prosiding pada 15 Januari 1998 walaupun tanpa alasan-alasan penghakiman dan adalah di luar masa untuk memfailkan rekod rayuan selama tiga bulan dan 22 hari. Perayu telah memohon pelanjutan masa untuk memfailkan rekod rayuan berdasarkan alasan-alasan berikut: (i) beliau tidak dapat mendrafkan memorandum rayuannya tanpa merujuk kepada alasan-alasan

penghakiman; dan (ii) maksud perkataan 'rekod rayuan' seperti yang diperuntukkan di bawah k 18(4) dibaca bersama dengan k 18(7) Kaedah-Kaedah Mahkamah Rayuan 1994 ('kaedah tersebut') adalah termasuk alasan-alasan penghakiman dan oleh kerana beliau belum lagi menerima alasan-alasan penghakiman, beliau tidak boleh memfailkan rekod rayuan di bawah maksud kaedah tersebut.

Diputuskan, menolak usul tersebut:

(1) Semasa perbicaraan untuk permohonan kebenaran tersebut, perayu walaupun tidak memiliki alasan-alasan penghakiman, telah berjaya meyakinkan mahkamah bahawa beliau berhak untuk diberikan kebenaran untuk merayu. Yang pasti, beliau arif tentang merit dan kelemahan kesnya yang berhak kepada suatu perbicaraan semula semasa rayuan (lihat ms 211C–D).

(2) Walaupun alasan penghakiman belum lagi sedia ada di dalam masa tiga minggu dari 15 Januari 1998 (tarikh penerimaan nota-nota prosiding), perayu mestilah terus memfailkan nota-nota prosiding bersama-sama dengan semua dokumen yang lain yang diperuntukkan di dalam perenggan-perenggan lain, iaitu perenggan (a), (b), (c), (d) dan (f) kepada k 18(4). Perenggan (e) kepada k 18(4) dengan jelas memperuntukkan bahawa ketiadaan alasan-alasan penghakiman tidak akan menghalang perayu daripada memulakan rayuannya. Perayu boleh memfailkan alasan-alaan penghakiman secara berasingan pada bila-bila masa sebelum perbicaraan rayuan tersebut (lihat ms 211H–212A).]

Notes

For cases on record of appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 865–890.

Legislation referred to

Rules of the Court of Appeal 1994 r 18(4), (7)

Gurbachan Singh (*Bhagwan Singh*) for the applicant/appellant.
Wrigglesworth (*Wrigglesworth & Co*) for the respondent.

Lamin PCA (delivering judgment of the court): The appellant applied for an extension of time to file the record of appeal and we heard and dismissed it with costs on 15 July 1998. The judgment of the court below was handed out on 6 October 1996 and the notice of appeal was filed on 24 October 1996. Under r 18(7) of the Rules of the Court of Appeal 1994 ('the Rules'), the appellant had six weeks after the entry of the appeal within which to file the record of appeal. The last date would have been 9 December 1996. By the registry's letter dated 6 December 1996, the appellant was granted an extension of time of three weeks after the receipt of the notes of proceedings within which to file the record of appeal. By 7 January 1998, the notes were ready and in fact by a letter of the same date from the secretary of the judge

of the High Court concerned addressed to the appellant's firm, they were already being transmitted to the appellant. Realizing that the record of appeal still had not been filed, the registry then on 18 May 1998 listed the appellant's appeal for disposal. By that time, the appellant had filed the motion for extension of time which we disposed of on 15 July 1998. On the day of the hearing of the said motion, counsel for the appellant admitted that the appellant was out of time to file the record of appeal by three months and 22 days.

The appellant admitted receiving the letter dated 7 January 1998 from the secretary of the High Court judge together with the notes of proceedings on 15 January 1998 though without the grounds of judgment. His reasons to justify his failure to file the record of appeal within time that merit discussion are only two. Firstly he said that he would not be able to draft his memorandum of appeal without the benefit of the grounds of judgment. It was brought to our attention that the appellant was granted leave to appeal on 30 June 1997. At the hearing of the application for leave, he was not in possession of the grounds of judgment then and yet he managed to convince the court that he should be granted leave to appeal. Obviously, he was fully seized of the merits and demerits of his case that should deserve a rehearing at the appeal. Secondly, he understood that the meaning of the words 'record of appeal' as provided for under r 18(4) read with r 18(7) was to include the grounds of judgment and therefore as he was not yet in possession of the grounds of judgment he could not file the record of appeal within the meaning of the rules. So the three weeks extension as granted in December 1996 had not begun to run. With respect, the reading of r 18(4) does not make it mandatory on the part of the party appealing to include the grounds of judgment with the memorandum of appeal for the purpose of filing the record of appeal either within the time as prescribed in r 18(7) or within such extended time as granted by the court. For ease of reference, we repeat here the relevant provision of r 18(4) which is para (e) and it reads:

> a copy of the written judgment or grounds of decision of the Judge, or a copy of the agreed notes of judgment as prepared by the parties and approved by the judge, if such written judgment, grounds of decision or agreed notes as approved is made available within the time limited for filing the record of appeal, provided that if the Court so orders, the absence of the written judgment, grounds of decision or agreed notes shall not prevent the appellant from proceeding with his appeal; ... .

In our view, the words 'if such written judgment, grounds of decision ... is made available within the time limited for filing the record of appeal, ...' simply mean that if they are available within the prescribed time or such extended time, and only then they shall be filed together with the memorandum of appeal and 'together shall be called the record of appeal'. Even though the grounds of judgment were still not available within the three weeks from 15 January 1998 (date of receipt of notes of proceedings), the appellant must proceed to file the notes of proceedings together with all other documents as stipulated in the other paragraphs namely paras (a), (b), (c), (d) and (f) of r 18(4). They shall then, for the moment, be called 'the record of appeal'. Paragraph (e) clearly provides that the absence of the

grounds of judgment 'shall not prevent the appellant from proceeding with his appeal'. There is however nothing in the rules which prevents the appellant from filing the grounds of judgment separately at any time before the hearing of the appeal. Even at the hearing of the appeal, if the judges are of the view that they must first have sight of the grounds of the judgment of the learned judge below before coming to a decision on a certain issue, they may order that the grounds of judgment be filed first before proceeding to hear the appeal. But that is not the issue before us. The issue is whether the grounds of judgment must necessarily form part of the record of appeal. Ideally they should. But not necessarily so. Only if they are available, they shall be filed together to form the record of appeal. For the reasons that we have expressed above, we dismissed the motion.

Motion dismissed.

Reported by Loo Lai Mee